No. 18-281

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, ET AL., APPELLANTS

v.

GOLDEN BETHUNE-HILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
ERIC S. DREIBAND
Assistant Attorney General
JEFFREY B. WALL
Principal Deputy Solicitor General
JOHN M. GORE
Principal Deputy Assistant Attorney General
MORGAN L. RATNER
Assistant to the Solicitor General
TOVAH R. CALDERON
ANNA M. BALDWIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether appellants have standing to bring this appeal.

2. Whether the district court applied the correct legal standard in concluding that the Virginia legislature predominantly relied on race when drawing each of the 11 challenged majority-minority districts in Virginia's 2011 House of Delegates redistricting plan.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a redistricting plan that the Virginia legislature maintains was designed in part to comply with the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. II 2014). The United States, through the Attorney General, has a direct role in enforcing the VRA. Accordingly, the United States has a significant interest in the proper interpretation of the VRA and the constitutional protections against the unjustified use of race in redistricting. The United States also has an interest in the proper application of constitutional standing principles, including the scope of legislative standing. The United States previously participated as an amicus curiae in this case. See 137 S. Ct. 788.

STATEMENT

1. a. When drawing legislative districts, States must balance a complex array of competing concerns while adhering to constitutional and statutory mandates. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). Among other requirements, the Equal Protection Clause of the Fourteenth Amendment prohibits an unjustified, predominant use of race in drawing districts. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," *Miller*, 515 U.S. at 916, courts must "exercise extraordinary caution" before concluding that district lines were drawn based on race, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (citation omitted). But if race "'was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district'"—*i.e.*, if race was the "'dominant and controlling rationale'" for a district's lines—then that use of race withstands constitutional scrutiny only if it is narrowly tailored "to a compelling state interest." *Id.* at 794, 797-798 (citations omitted).

b. The VRA imposes additional obligations on States concerning race and redistricting. Section 2 of the VRA establishes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 557 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 52 U.S.C. 10301(a). A violation of Section 2 is established when members of a minority group

"have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

At the time of the redistricting measures at issue here, Section 5 of the VRA also required covered jurisdictions, including Virginia, to obtain preclearance of districting changes by showing that they had neither the purpose nor the effect of "denying or abridging the right to vote on account of race." 52 U.S.C. 10304(a). To comply with the VRA, Virginia had to show that its redistricting plan would not result in retrogression of a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether the plan was retrogressive, federal authorities compared the new plan against the existing, or "benchmark," plan, using updated census data and conducting a functional analysis of the minority community's ability to elect in each relevant district. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470-7471 (Feb. 9, 2011).

2. This case involves Virginia's 2011 redistricting plan for its House of Delegates (2011 plan). The Court previously considered a racial gerrymandering challenge to the 11 districts at issue here, along with a twelfth district no longer at issue. See *Bethune-Hill*, *supra*.

Following the 2010 census, Virginia began the redistricting process for its state legislative districts. J.S. App. 2-3. As part of that process, the House of Delegates Committee on Privileges and Elections adopted a resolution establishing redistricting criteria. *Id.* at 220-222. That resolution set standards for addressing population equality and compliance with the VRA. *Ibid.* It also required observation of traditional redistricting

principles such as compactness, contiguity, and respect for communities of interest. *Id.* at 221-223; see Va. Const. Art. II, § 6.

State legislator Chris Jones served as the primary architect of the 2011 plan. J.S. App. 3. He identified 12 districts where, in both the "benchmark" 2001 plan and earlier plans, African-Americans had constituted a majority of the voting-age population and had the ability to elect candidates of their choice. *Id.* at 4 & n.6, 223; *Bethune-Hill*, 137 S. Ct. at 795. As part of the 2011 map-drawing process, Jones and other legislators determined that all 12 of those districts needed to have a black voting age population (BVAP) of at least 55% to comply with Section 5's "non-retrogression" requirement. J.S. App. 4-5. In the benchmark plan, nine of the 12 districts had BVAPs exceeding 55%; in the 2011 plan, all 12 districts did. *Id.* at 5.

In April 2011, the legislature passed the plan with "broad bipartisan support, as well as support from a majority of the black members of the House of Delegates," and the governor signed it into law. J.S. App. 6. The United States Attorney General precleared the plan in June 2011. *Id.* at 231.

3. a. The plaintiffs-appellees are registered voters residing in each of the 12 majority-minority districts. J.S. App. 6. In 2014, they filed this suit against the Virginia State Board of Elections and various state election officials (collectively, the state defendants), challenging the 12 districts as unconstitutional racial gerrymanders in violation of the Equal Protection Clause. *Ibid.* Shortly thereafter, the Virginia House of Delegates and its Speaker in his official capacity (collectively, the House) intervened as defendants. *Id.* at 7. Since that time, the

House "ha[s] borne the primary responsibility of defending the 2011 plan." *Ibid.*

b. Following a bench trial, a divided three-judge district court initially upheld the 2011 plan. J.S. App. 204-338. The court concluded that race did not predominate in 11 of the 12 challenged districts: Districts 63, 69, 70, 71, and 74 in the Richmond area; Districts 92 and 95 in the North Hampton Roads area; and Districts 77, 80, 89, and 90 in the South Hampton Roads area. *Id.* at 298-338. In District 75 in southern Virginia, the court determined that race predominated but that the district survived strict scrutiny. *Id.* at 307-313.

Judge Keenan dissented. J.S. App. 339-356. She would have struck down all 12 challenged districts as unconstitutional. *Id.* at 342.

c. The plaintiffs-appellees appealed, and this Court affirmed in part and vacated in part. *Bethune-Hill*, 137 S. Ct. at 802. The Court vacated the district court's finding that race did not predominate in 11 of the 12 challenged districts. *Ibid.* It reasoned that the district court had committed two legal errors in its analysis of racial predominance. *Id.* at 797-800. First, the court had mistakenly required "a conflict or inconsistency between the enacted plan and traditional redistricting criteria." *Id.* at 799. Second, the court had failed to undertake a "holistic analysis" of each challenged district and had instead examined only those portions of a district that conflicted with traditional districting criteria. *Ibid.* This Court accordingly remanded for the district court to consider whether, under the proper legal standard, race predominated in the drawing of the challenged districts. *Ibid.* The Court separately affirmed the district court's conclusion that District 75 satisfied strict scrutiny. *Id.* at 800-802.

4. a. On remand, a divided three-judge district court, with Judge Keenan now writing for the majority, concluded that race predominated in the drawing of all 11 remaining challenged districts and that none satisfied strict scrutiny. J.S. App. 2.[1]

In evaluating racial predominance, the district court began with "statewide evidence" demonstrating the legislature's use of a 55% BVAP floor and "overall racial disparities in population movement." J.S. App. 16, 38. The court reasoned that "race may predominate in the drawing of a particular legislative district even if that district begins with a BVAP over 55% or if particular district lines were not necessary to achieve the 55% figure." *Id.* at 19. It also discussed how areas with higher BVAPs were more likely to be drawn within one of the challenged districts. See *id.* at 20-32, 84.

"Mindful of the statewide evidence of race-based decisionmaking" that it had identified, the district court then purported to perform a district-by-district analysis of the legislature's use of race. J.S. App. 38. "Because a change to the boundaries of any one district caused a ripple effect on nearby districts," the court "consider[ed] the challenged districts in three regional groupings." *Ibid.* The court focused on certain district lines that the legislature had changed, see *id.* at 39-80, and held that "the legislature subordinated traditional districting criteria to racial considerations" in "all the 11 remaining challenged districts," *id.* at 82.

Applying strict scrutiny, the district court determined that, for each of the 11 districts, the use of race was not narrowly tailored to comply with Section 5. J.S.

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[1] On remand, Judge Wright Allen replaced Judge Lee, who had joined Judge Payne's majority opinion after the first trial. Judge Allen joined Judge Keenan in the majority.

App. 86-96. The court thus concluded that all 11 districts violate the Equal Protection Clause. *Id.* at 97.

b. Judge Payne dissented. J.S. App. 98-201. He would have afforded little weight to the statewide evidence relied upon by the majority. See *id.* at 123-124. He also performed a different district-by-district analysis, with a greater focus on race-neutral goals and line-drawing decisions within each challenged district. See *id.* at 124-201. Judge Payne would have concluded that race did not predominate in the drawing of any of the 11 districts. *Id.* at 201.

5. The House, but not the state defendants, filed a notice of appeal. J.S. App. 357-358. The state defendants then moved to dismiss, contending that the House lacks standing to appeal. See State Appellees' Mot. to Dismiss. This Court directed the parties to brief that question and postponed its jurisdictional determination to the hearing of this case on the merits.

SUMMARY OF ARGUMENT

I. Appellants—the Virginia House of Delegates and its Speaker in his official capacity (collectively, the House)—lack standing to bring this appeal. The House contends that it has standing because the Commonwealth has been injured and the House represents the Commonwealth's interests. To be sure, a State may authorize legislative officials "to represent the State's interests" in federal court, *Karcher* v. *May*, 484 U.S. 72, 82 (1987), but here a Virginia statute vests that authority in the Virginia Attorney General, Va. Code Ann. § 2.2-507(A) (2017). The House reasonably may have believed that it was so authorized because the Attorney General allowed it to "b[ear] the primary responsibility of defending the 2011 plan," J.S. App. 7, before abandoning the law's defense and opposing the House's

standing on appeal. Nevertheless, the House has not identified any valid basis in state law to conclude that Virginia has in fact authorized the House to litigate on the Commonwealth's behalf.

The House also contends that it has standing in its own right because it enacted the redistricting legislation and because a decision holding that legislation unconstitutional will affect its composition. Neither interest is cognizable under Article III. As to the former, a legislature (let alone a single chamber of a bicameral legislature) has no valid interest in enforcing or defending the laws that it enacts. As to the latter, this Court has concluded that a legislature has asserted a cognizable institutional injury only in rare circumstances, and never in circumstances like those presented here. The House has no identifiable *institutional* interest in the location of district lines, which merely have an indirect effect on which legislators happen to hold office. Expanding the class of cognizable institutional injuries could open the door to any number of lawsuits by state legislative bodies and the Houses of Congress.

II. If the Court reaches the merits, it should vacate the district court's judgment that race predominated in all 11 challenged districts and remand for further proceedings. To establish racial predominance, plaintiffs must meet a demanding standard. They must prove that race "was the legislature's dominant and controlling rationale in drawing its district lines" and that the legislature thus "subordinated traditional race-neutral districting principles * * * to racial considerations." *Miller* v. *Johnson*, 515 U.S. 900, 913, 916 (1995). The district court committed three interrelated errors that together diluted the demanding racial-predominance analysis.

First, the district court placed significant weight on the undisputed 55% BVAP threshold and other statewide evidence. Although a racial target can be relevant to the predominance analysis, its relevance turns on whether race actually constrains the legislature's options in redistricting. Here, the 55% BVAP floor was not uniformly constraining, and the other statewide evidence that the district court identified did not sufficiently connect the racial target to specific line-drawing decisions in each challenged district.

Second, the district court failed to perform a proper holistic analysis of each challenged district. It marshaled evidence of race-based districting decisions, but it failed to compare the use of race to the race-neutral districting principles at play. In Districts 69, 70, and 92, for example, the court identified narrow race-based population shifts, without further determining which other districting factors had been subordinated to race. And the court devoted little analysis to the ways in which traditional districting considerations also shaped those districts' boundaries.

Third, the district court failed to perform an independent analysis of all 11 districts. It reasoned that all of the challenged districts were "inextricably intertwined," J.S. App. 83, suggesting that if race predominated for some, then it predominated for all. That misapplication of the required district-by-district analysis was most evident in the court's assessment of District 92, where the court found that race predominated almost exclusively because of its conclusion about the neighboring District 95.

In light of those three errors, the district court too readily found that race predominated in each majority-minority district. This Court should vacate the district

court's decision and again remand for application of the correct racial-predominance standard.

ARGUMENT

I. THE HOUSE LACKS STANDING TO APPEAL

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. Const. Art. III, § 2. Standing to sue or defend is an "essential aspect" of the case-or-controversy requirement. *Hollingsworth* v. *Perry*, 570 U.S. 693, 704 (2013). To have standing, the party invoking the federal court's jurisdiction must establish injury-in-fact, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The injury-in-fact component requires "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Id.* at 560 (citation omitted). Not every perceived grievance qualifies; rather, "the alleged injury must be legally and judicially cognizable." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997).

The requirement to show a judicially cognizable injury "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). In this case, the state defendants—the named defendants below—elected not to appeal the district court's adverse decision. See State Appellees' Mot. to Dismiss 3. Only the House, which intervened in defense of the 2011 plan in the district court, seeks review in this Court. But "status as an intervenor below * * * does not confer standing sufficient to keep the case alive in the absence of the State on * * * appeal." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). Instead, "an intervenor's right to continue a suit in the absence of the party on whose side intervention

was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Ibid.*

The House advances (Br. 22-30) two theories of injury, one resting on the Commonwealth's interests and another resting on the House's own asserted interests. Neither theory satisfies Article III.

A. The House Has Not Demonstrated That It Represents The Commonwealth As A Matter Of State Law

1. The House asserts (Br. 28-30) that it has standing to bring this appeal on behalf of Virginia. A State whose law is invalidated "has standing to defend the constitutionality of [the] statute" on appeal because it has a "'direct stake' * * * in defending the standards embodied in" state law. *Diamond*, 476 U.S. at 62, 65 (citation omitted). A State generally may, as a matter of state law, authorize the governmental officials of its choosing "to represent the State's interests" in federal court. *Karcher* v. *May*, 484 U.S. 72, 82 (1987). While States ordinarily vest that authority with the state attorney general, they need not necessarily do so. *Hollingsworth*, 570 U.S. at 710. Virginia could thus authorize its legislature to act on behalf of the Commonwealth in defending the constitutionality of legislation generally or of redistricting plans specifically.

The House may have believed that it was so authorized, as the Virginia Attorney General allowed it to "b[ear] the primary responsibility of defending the 2011 plan," J.S. App. 7, before abandoning the law's defense and opposing the House's standing on appeal. Nevertheless, the House has not identified any valid basis in state law to conclude that Virginia has in fact authorized the House to litigate on the Commonwealth's behalf. To the contrary, a Virginia statute provides that "[a]ll legal

service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General," except in circumstances inapplicable here. Va. Code Ann. § 2.2-507(A) (2017). By contrast, other States have enacted statutes authorizing their legislatures to represent the State's interests in certain circumstances. See Ind. Code Ann. § 2-3-8-1 (LexisNexis 2012) (authorizing General Assembly to defend redistricting laws); N.C. Gen. Stat. § 120-32.6(b) (2017) (providing that "the General Assembly shall be deemed to be the State of North Carolina" to defend the constitutionality of state laws).

The House notes (Br. 29) that state courts have permitted it to intervene to defend state laws. But that does not demonstrate the House has state-law authorization to represent *the Commonwealth itself*. At most, it shows that Virginia courts have concluded the House has a sufficient interest to satisfy the state-law standard for intervening as a defendant. See Va. Sup. Ct. R. 3:14 (permitting intervention to raise "any claim or defense germane to the subject matter of the proceeding"). When the Virginia Supreme Court has acknowledged the House's intervention, it has not additionally indicated that the House appears on the Commonwealth's behalf, much less identified a source of state-law authorization for the House to do so. See *Vesilind* v. *Virginia State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018); *Edwards* v. *Vesilind*, 790 S.E.2d 469, 473 n.2 (Va. 2016).[2]

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[2] The House alternatively suggests (Br. 29-30) that the state defendants have forfeited their ability to contest the House's status as

2. The House contends (Br. 28-29) that this Court in *Karcher* held that state legislators' ability to intervene as defendants establishes their authority to represent the State in litigation. See 484 U.S. at 81-82. For several reasons, *Karcher* does not control here.

First, the Court's passing remark in *Karcher* that the New Jersey legislature had authority to act on behalf of the State must be taken in context. The Court was rejecting the argument that New Jersey law did not authorize state legislators to litigate on behalf of *the legislature*. 484 U.S. at 81-82. The Court was not addressing the quite different question whether New Jersey law authorized the legislature to litigate on behalf of *the State*. Second, the Court's interpretation of state law was not a square holding even on its own terms, as the Court merely described what New Jersey law "appear[ed] to" authorize. *Id.* at 82. Third, the Court may have misunderstood New Jersey law. In the only New Jersey case that the Court cited, state legislators intervened as defendants alongside the New Jersey attorney general—which does not mean state law authorized those legislators to act independently on the State's behalf. See *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982) (per curiam). All told, *Karcher* offers little insight on the question of when state law authorizes a legislature or individual legislators to represent the State itself in litigation.

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a representative of the Commonwealth. But, assuming that argument may be forfeited, the House does not identify any affirmative representations that the House was acting on behalf of the Commonwealth as opposed to representing its own asserted interests. See, *e.g.*, J.A. 2966 (House's motion to intervene based on its interests as a "legislative body"); J.A. 2993-2994 (state defendants' joinder in House's defense).

B. The House Lacks A Cognizable Institutional Interest In The Location Of District Lines

The House also asserts (Br. 22-28) that it has standing in its own right to defend the district lines that it drew. To the extent that theory of standing relies on the House's role in enacting redistricting legislation, a legislative body—whether a state legislature or Congress—lacks an independent, cognizable interest in the enforcement of the laws that it enacts.

1. In the federal system, the Constitution gives Congress only "legislative Powers," U.S. Const. Art. 1, § 1, and the "power to seek judicial relief * * * cannot possibly be regarded as merely in aid of the legislative function." *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam). As a result, "once Congress makes its choice in enacting legislation, its participation ends." *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986). Although Congress may, at times, disagree with an Executive Branch decision not to defend the constitutionality of a duly enacted law, it has no judicially cognizable interest in the "execution of the Act" it enacted. *Id.* at 734. If it were otherwise, the judiciary could be called upon to "step directly between the other branches and settle disputes," *Barnes* v. *Kline*, 759 F.2d 21, 53 (D.C. Cir. 1985) (Bork, J., dissenting), vacated, 479 U.S. 361 (1987), such that "the system of checks and balances [would be] replaced by a system of judicial refereeship," *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985), abrogation recognized by *Chenoweth* v. *Clinton*, 181 F.3d 112 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000).

The same is true here. A branch of a state government that makes rather than enforces the law does not

itself have a cognizable Article III interest in the defense of its laws. That is particularly true where the House functions as one half of a bicameral legislature that enacts redistricting laws and has no independent power to draw district lines. See Va. Const. Art. IV, § 11. In the political sphere, the House may criticize or penalize the Virginia Attorney General's decision to abandon defense of a validly enacted state law, but it may not override that decision in court (again, unless state law authorizes the House to represent the Commonwealth in litigation). The House's contrary view, under which its claimed injury rests on the dilution of its lawmaking power, would open the door to any number of lawsuits by state legislative bodies and the Houses of Congress.

2. The House nevertheless contends (Br. 25) that it has a unique interest in defending redistricting legislation because of its "stake" in the "basic representational make-up of the House." That contention is at odds with this Court's cases and is not readily limited to the redistricting context.

As this Court has emphasized, "it is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth*, 570 U.S. at 700. Rather, it must "have suffered a concrete and particularized injury." *Ibid.* As a general matter, a legislative body will be unable to allege a cognizable "'*personal injury*,'" as opposed to a non-cognizable "injury to official authority or power." *Raines*, 521 U.S. at 818, 826 (citation omitted). In *Raines*, for example, this Court held that it lacked jurisdiction to adjudicate a challenge brought by several Members of Congress to the constitutionality of the Line Item Veto Act. *Id.* at 813-814.

The Court distinguished those legislators' claim of a "dilution of institutional legislative power," *id.* at 826, from prior decisions recognizing standing for individual members who had suffered personal injury, such as the denial of a seat in Congress, *id.* at 820-821.

Although individual members of the House may have a keen personal interest in the location of district lines, this Court has never recognized that as an *institutional* injury. Those district lines do not restrain the House as an institution, but instead have an indirect effect on which candidates happen to be elected (as well as a direct effect on which people each legislator represents). Just as a citizen lacks a cognizable interest "in the overall composition of the legislature," *Gill* v. *Whitford*, 138 S. Ct. 1916, 1931 (2018), so too the House as a body lacks a cognizable interest in its overall composition. Otherwise, the House presumably could litigate election-related challenges affecting individual candidates, or appeal judgments passing on the constitutionality of election-related laws, or even appeal judgments about laws that involve hot-button political issues and thus affect candidates' electoral prospects. Those types of purported institutional injuries are "wholly abstract and widely dispersed" and cannot support Article III standing. *Raines*, 521 U.S. at 829.

The House's contrary position relies (Br. 25) on this Court's summary decision in *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (per curiam). As an initial matter, *Beens* focused primarily on the scope of a Minnesota Senate resolution. See *id.* at 193-194. Moreover, *Beens* may no longer be good law. The Court held that the Minnesota Senate had standing to challenge a remedial order following an apportionment suit because the Senate was "an appropriate legal entity

for purposes of intervention and, *as a consequence*, of an appeal." *Id.* at 194 (emphasis added). This Court later rejected that reasoning in *Diamond*, holding that "status as an intervenor * * * does not confer standing" to appeal. 476 U.S. at 68. And *Raines* further indicated that actions that "directly affect[]" legislators, *Beens*, 406 U.S. at 194, do not establish Article III standing if they amount only to an "injury to official authority or power," *Raines*, 521 U.S. at 826.

In any event, the Minnesota Senate in *Beens* specifically did "not challenge the District Court's conclusion that the legislature is * * * malapportioned" but rather challenged a remedial order that had "reduce[d] the number of legislative districts [from 67] to 35" and, accordingly, "the number of senators by almost 50%." 406 U.S. at 188; see *id.* at 189. That sort of fundamental change—shrinking the overall size of a collective legislative body—has a distinct and more direct effect on the body itself than a mere shift in district lines. Even assuming *Beens*'s passing statement on standing remains good law, it should not be extended to the abstract and dubious institutional injury asserted here.

The House also relies (Br. 27) on this Court's decision in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). That decision is likewise inapposite. There, the state legislature asserted that a ballot initiative creating an independent redistricting commission had affirmatively stripped the legislature of its "exclusive, constitutionally guarded" responsibility under the Elections Clause of the U.S. Constitution to draw district lines for federal elections. *Id.* at 2663; see *ibid.* (recognizing that standing "often turns on the nature and source of the claim asserted") (citation omitted). Here, the House has not

asserted a similar injury. Indeed, the House does not assert that its own rights have been infringed at all, but rather that a federal court misapplied the constitutional rights of state voters in invalidating a state law.

In sum, because the legislative body has not itself been modified, as in *Beens*, *supra*, nor been affirmatively stripped of its asserted constitutional prerogatives, as in *Arizona State Legislature*, *supra*, the House has not suffered the rare type of *institutional* injury that this Court has treated as cognizable under Article III. That is not to say no one (other than the Virginia Attorney General) would have standing to appeal in these circumstances. It remains an open question whether individual candidates in challenged districts or in neighboring districts could assert cognizable *personal* injuries under Article III if district lines would be redrawn in a manner likely adverse to their electoral prospects. See *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1737 (2016); see also *Meese* v. *Keene*, 481 U.S. 465 (1987). Here, however, individual candidates did not join the House in defending the 2011 plan.

II. THE DISTRICT COURT APPLIED AN IMPROPER LEGAL STANDARD FOR RACIAL PREDOMINANCE

Two Terms ago, this Court vacated the district court's initial judgment that race did not predominate in any of the 11 challenged districts, faulting the district court for failing to undertake a "holistic analysis" as to whether race predominated in the construction of each challenged district. *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). On remand, the district court reversed its conclusion but repeated its error: In determining that race predominated in all 11 districts, it again failed to perform a holistic analysis of each individual district. If the Court concludes that the

House has standing, it should vacate the district court's judgment and remand once again for application of the proper legal standard.

A. Racial Predominance Is A Demanding Standard

1. The Equal Protection Clause "limits racial gerrymanders in legislative districting plans." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017). It prevents States, "in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Ibid.* (quoting *Bethune-Hill*, 137 S. Ct. at 797). The harms stemming from a racial gerrymander "include being personally subjected to a racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group," *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1265 (2015) (*Alabama*) (brackets, citations, ellipses, and internal quotation marks omitted). The analysis thus focuses on the line-drawing process because the constitutional injury springs from being unjustifiably sorted by race. *Shaw* v. *Reno*, 509 U.S. 630, 650, 652 (1993) (*Shaw I*).

In assessing a racial gerrymandering claim, courts perform a two-step analysis. First, the plaintiff must prove that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama*, 135 S. Ct. at 1267 (emphasis added) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)). To make that "demanding" showing, *Cooper*, 137 S. Ct. at 1479, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles * * * to racial considerations," *Miller*, 515 U.S. at 916. Subordination occurs when "race for its own sake, and not other districting principles, was the legislature's dominant

and controlling rationale in drawing its district lines." *Id.* at 913; see *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*).[3]

Second, if the plaintiff succeeds in showing that racial considerations predominated, strict scrutiny applies. The burden shifts to the State to show that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 800). When a State invokes the VRA to justify race-based districting, the State can satisfy the narrow-tailoring requirement by showing that it had "'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines." *Id.* at 1464 (quoting *Alabama*, 135 S. Ct. at 1274).

2. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, because legislative apportionment is "primarily the duty and responsibility of the State," *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 543 (2013) (citation omitted). For that reason, in redistricting cases, the "good faith of the state legislature must be presumed." *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (brackets and citation omitted). In addition, "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Miller*, 515 U.S. at 916). Maintaining a rigorous standard for

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[3] The predominance standard for a racial gerrymandering claim differs from the standard for a constitutional vote-dilution claim. Because the latter involves purposeful efforts to achieve a discriminatory dilutive effect, it requires proof only that race was a motivating factor in a decision that harms minority voting strength. See *Rogers* v. *Lodge*, 458 U.S. 613, 617-618 (1982).

racial predominance ensures that, even where a legislature impermissibly uses race when drawing some districts, courts invalidate only the unconstitutional portions of a legislative map and avoid "intrud[ing] upon state policy any more than necessary." *Upham* v. *Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (citation omitted); see *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978).

B. The District Court Did Not Apply A Sufficiently Demanding Predominance Standard

In finding that race predominated in all 11 challenged districts, the district court failed to apply the demanding analysis that this Court requires. Instead, it skewed the predominance inquiry in three interrelated ways: (1) by placing inordinate weight on the statewide 55% BVAP floor; (2) by focusing on particular race-based decisions rather than evaluating those decisions in the context of each district as a whole; and (3) by allowing a predominance finding in one district to spill over into neighboring districts.

1. The district court placed too much weight on a statewide racial threshold

At the start of its analysis, the district court emphasized the "statewide evidence" that the challenged districts were drawn using a 55% BVAP floor. J.S. App. 16. The court stressed the existence of a racial threshold without analyzing whether that threshold actually drove the legislature to subordinate traditional districting principles to race in each challenged district. See, *e.g.*, *id.* at 19. Its decision to give across-the-board significance to a racial target and other statewide evidence was misguided.

a. In *Alabama*, this Court explained that a statewide racial objective may be "perfectly relevant" to a

district-specific predominance inquiry. 135 S. Ct. at 1267. But the key lesson from *Alabama* is not that the *existence* of a racial target carries dispositive weight. If that were true, this Court would not have needed to remand this case for a proper predominance inquiry. See *Bethune-Hill*, 137 S. Ct. at 800. Instead, statewide evidence is most salient when it reveals "a policy of *prioritizing* mechanical racial targets above all other district criteria." *Alabama*, 135 S. Ct. at 1267 (emphasis added).

A racial target is thus most probative of racial predominance where it highly constrains the legislature's options based on race. In *Alabama*, for example, the State added 15,785 individuals to a district, of whom "only 36" were white, in order to maintain a BVAP of over 70%. 135 S. Ct. at 1263. And in *Cooper*, the State's mapmaker testified that he needed to override traditional districting criteria to transform two districts with below-50% BVAP into majority-minority districts. 137 S. Ct. at 1465-1466, 1468-1469. By contrast, a racial threshold is less probative where it is not particularly constraining and is consequently less likely to dictate the legislature's specific line-drawing choices. For example, if local demographics are such that any reasonably compact district that respects relevant districting principles will exceed a racial target, then race will not predominate because it will not be the "dominant and controlling" rationale for the district's lines. *Miller*, 515 U.S. at 913.

Given States' obligations under the VRA, courts must carefully evaluate the degree to which a racial threshold actually dictates the legislature's line-drawing choices, rather than automatically ascribe significance to race-conscious goals. Compliance with the

VRA will sometimes involve consideration of race as one factor in drawing an affected district—*e.g.*, avoiding retrogression under Section 5, see *Abbott*, 138 S. Ct. at 2315, or determining under Section 2 whether a majority-minority district with a racial "floor" of 50% can be drawn, see *Bartlett* v. *Strickland*, 556 U.S. 1, 14-16 (2009) (plurality opinion). But a State's effort to comply with the VRA does not automatically constitute racial predominance when the State relies on multiple criteria and race does not overwhelm the line-drawing process. See *Bush* v. *Vera*, 517 U.S. 952, 958-959 (1996) (plurality opinion). If every attempt to prevent retrogression under Section 5, to avoid dilution under Section 2, or otherwise to draw majority-minority districts triggered strict scrutiny, federal courts could become overly involved in redistricting, "represent[ing] a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Such a rule would "lay a trap for an unwary legislature" attempting to satisfy both constitutional and statutory requirements. *Alabama*, 135 S. Ct. at 1273-1274.

b. Here, it is undisputed that the legislature applied a 55% BVAP floor when drawing the 2011 map. See *Bethune-Hill*, 137 S. Ct. at 795-796. The district court focused on that 55% figure, without demanding evidence connecting the racial target to particular district lines in all 11 challenged districts. See, *e.g.*, J.S. App. 19 (describing 55% BVAP as indicative of racial predominance even "if particular district lines were not necessary to achieve the 55% figure"); *id.* at 83-84 ("Common to all the challenged districts * * * was the legislature's application of an express racial target of 55% BVAP.") (citation and internal quotation marks omitted).

The mere existence of a 55% BVAP floor was not uniformly constraining. The plaintiffs-appellees challenged all of the ability-to-elect districts in the House, only three of which had a BVAP below 55% under the benchmark plan. J.A. 2807. In some districts—such as District 92, where the BVAP changed from 62.1% in the benchmark plan to 60.7% in the 2011 plan, or District 70, where the BVAP changed from 61.8% to 56.4%, *ibid.*—a statewide floor of 55% appears marginally relevant. Indeed, the plaintiffs-appellees' expert testified that meeting the BVAP floor was not equally difficult in every district, acknowledging that "in most instances * * * there [we]re other ways to get" to 55% BVAP. J.S. App. 112; see *id.* at 114. The district court erroneously declined to consider the flexibility that the legislature had in drawing specific districts while meeting a statewide racial threshold.

The other statewide evidence that the district court consulted added little to its predominance analysis. Much of that evidence merely confirms that a 55% BVAP floor was used in the construction of the challenged districts. See J.S. App. 22-25. For example, the court noted that one expert created "dot density maps" showing "significant concentrations of black voters" in the challenged districts. *Id.* at 22. The court also recited another expert's finding "that BVAP level was predictive of an area's inclusion in a challenged district." *Id.* at 25. Those findings, however, are unremarkable in a case challenging every existing ability-to-elect district. They mostly illustrate the obvious fact that all the challenged districts contained sufficient concentrations of minority voters to maintain their ability to elect preferred candidates.

2. The district court failed to assess race as part of a holistic analysis of each district as a whole

When it turned to the individual districts, the district court erred yet again. This Court previously held that predominance does not require a strict conflict with traditional districting criteria, and it instructed that courts "should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district." *Bethune-Hill*, 137 S. Ct. at 800. It remanded for the district court to perform a "holistic analysis" that "consider[s] all of the lines of the district at issue." *Ibid.* Although the district court acknowledged that mandate, J.S. App. 16, in practice it did not perform the required analysis of each individual district.

a. An analysis of racial predominance is necessarily comparative. On multiple occasions, this Court has defined predominance by reference to subordination—*i.e.*, that race rather than all other districting factors be the dispositive consideration. See, *e.g.*, *Cooper*, 137 S. Ct. at 1469 (upholding predominance finding where "an announced racial target * * * subordinated other districting criteria"); *Alabama*, 135 S. Ct. at 1270 (noting that plaintiffs must "prove that the legislature subordinated traditional race-neutral districting principles to racial considerations") (quoting *Miller*, 515 U.S. at 916) (citation, ellipsis, and emphasis omitted); *Vera*, 517 U.S. at 978 (plurality opinion) (explaining that "[t]he constitutional problem arises only from the subordination of [traditional districting] principles to race"). This Court's prior decision in *Bethune-Hill* did not relieve plaintiffs of the burden of showing that "race for its own sake is the *overriding* reason" for the legislature's

choice of particular district lines. 137 S. Ct. at 799 (emphasis added).

Although a rare case may present such overwhelming direct evidence of legislative purpose to support a racial gerrymandering claim in the absence of any conflict between race and traditional districting principles, *Bethune-Hill*, 137 S. Ct. at 799, the presence of such conflicts usually remains the touchstone of the subordination analysis. As the Court previously observed, "in many" if not "most" cases, plaintiffs seeking to establish racial gerrymandering "will be unable" to prove their claim "without evidence that the enacted plan conflicts with traditional redistricting criteria." *Ibid.* Indeed, this Court has never affirmed a predominance finding, or even remanded for a determination of predominance, "without evidence that some district lines deviated from traditional principles." *Ibid.* (citing *Alabama*, 135 S. Ct. at 1265-1266; *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999); *Vera*, 517 U.S. at 966, 974 (plurality opinion); *Shaw II*, 517 U.S. at 905-906; *Miller*, 515 U.S. at 917; *Shaw I*, 509 U.S. at 635-636).

b. In its original opinion, the district court mistakenly assessed only those district lines that conflicted with traditional districting criteria. See *Bethune-Hill*, 137 S. Ct. at 799. This time, it swung too far in the other direction: It focused primarily on race-based motives for drawing certain district boundaries without discussing the degree to which each challenged district reflects other traditional districting criteria. Because of its incomplete analysis, the district court too readily found racial predominance in certain instances.

Three examples illustrate the district court's unduly narrow focus: Districts 69 and 70 in the Richmond region, and District 92 in the North Hampton Roads region.

i. District 69 began with a 56.3% BVAP, J.S. App. 47, and the district court identified no "stark split[] in the racial composition of populations moved into and out of" the district. *Bethune-Hill*, 137 S. Ct. at 800. To the contrary, 44.7% of the voting-age persons moved into the district were African-American, as compared with 43.5% of those moved out of the district. J.A. 643. The court observed that the legislature had added whole or partial voting districts (VTDs) from both predominantly white and predominantly black areas and had maintained roughly the same racial composition under the 2011 plan as under the benchmark plan. J.S. App. 48-49; see J.A. 643. The court believed that those movements of both black and white voters were necessary to comply with the legislature's 55% BVAP floor. J.S. App. 47, 49. But for race to predominate, it must be "the overriding factor causing neutral considerations to be cast aside" in "the design of the district as a whole." *Bethune-Hill*, 137 S. Ct. at 799-800. The court did not identify how the 55% BVAP floor operated as a constraint that suffused race through the drawing of District 69 as a whole.

Indeed, the district court's best evidence of race-related sorting as to District 69 involved one VTD in Richmond. The court noted that the mapmakers split the VTD between District 69 and a non-challenged district and that District 69 received more of the BVAP from that VTD (93%) than total population from that VTD (77%). J.S. App. 48. But that single split is hardly indicative of wholesale racial sorting. The precinct in

question contains fewer than 5000 people, of whom about 3500 (the majority of whom are white) were included in District 69, out of the approximately 80,000 people in the district. J.A. 2793. Even assuming that the legislature considered race in dividing the VTD, but see J.S. App. 151-152 & n.29, one race-conscious VTD split is a thin reed on which to base a district-wide finding of racial predominance.

While citing scant evidence of race-based decisionmaking, the district court omitted any analysis of the other reasons for District 69's overall construction. The court did not mention that District 69's compactness scores improved considerably in the 2011 plan, placing it in the top quintile of all state districts across two different measures for compactness, see J.A. 1080, 1086, or that the 2011 plan reunified two VTDs that had been split in the prior plan, see J.A. 2669. Nor did it acknowledge that the general movement of people into and out of District 69 followed a clear non-racial shift toward Richmond and eliminated irregular prior boundaries along the James River. See J.A. 1510; see also J.S. App. 150. At the same time, District 69 retained 83% of the total population of the district (*i.e.*, the district's core) from the benchmark plan. J.A. 1090. Yet the court failed to weigh any of these non-racial considerations in its predominance analysis.

ii. The district court's discussion of the neighboring District 70 is similarly incomplete. J.S. App. 45-47. The court again focused on what it viewed as race-related population shifts, as the BVAP of areas moved out of District 70 was 16% higher than the BVAP of areas moved in. *Id.* at 46. To be sure, the court recited some direct testimony that three VTDs moved from District 70 to District 71 had been selected for their

high BVAP. See *id.* at 41, 47. But even disregarding possible race-neutral objectives for moving those particular VTDs, see *id.* at 130-131, the transfer of three VTDs does not demonstrate that race predominated over other non-racial motives in the district as a whole. For example, population shifts from District 70 aligned neighboring District 69 with the James River, see J.A. 1511, and better aligned neighboring District 71 with the Richmond border, see J.S. App. 130a.

iii. The district court likewise failed to conduct a holistic analysis of District 92 and to identify any traditional districting criteria that were subordinated to race. Located entirely within the city of Hampton in both the benchmark and 2011 plans, J.S. App. 62, District 92's BVAP changed from 62.1% under the benchmark plan to 60.7% under the 2011 plan, J.A. 640. The 2011 plan retained nearly 87% of the core from the benchmark plan in the new district, J.A. 1090, and it reduced the number of VTD splits from three to zero, J.S. App. 62. Under the 2011 plan, District 92 also became more compact, as it dropped its northernmost territory in favor of western areas closer to the district's center. J.A. 1081, 1087, 1516.

The district court's original decision observed that it is "hard to imagine a better example of a district that complies with traditional, neutral districting principles." J.S. App. 335. Yet on remand, the court concluded that race predominated, largely because District 92 had received three high-BVAP VTDs from District 95 (which was underpopulated) and because District 92 could have theoretically expanded into heavily white areas instead. *Id.* at 63. The court did not appear to weigh contrary evidence that the 55% BVAP floor did not dictate district lines, including that the legislature also

moved a heavily white VTD from District 95 to District 92, see *id.* at 63 n.45; J.A. 1516, or that the legislature could have added other heavily white VTDs without dropping the district's BVAP below 55%, see J.A. 3580. Those omissions suggest that the court failed to assess the role of traditional districting considerations in the construction of the district as a whole.

3. The district court failed to perform an independent analysis of racial predominance in each district

A third analytical error infected the district court's predominance inquiry. In portions of its analysis, when the court determined that race predominated in one district, it treated that determination as having an insuperable spillover effect on neighboring districts.

a. "[T]he basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Bethune-Hill*, 137 S. Ct. at 800. That "district-by-district" inquiry reflects "the nature of the harms that underlie a racial gerrymandering claim," including "being 'personally subjected to a racial classification,' as well as being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Alabama*, 135 S. Ct. at 1265 (brackets, citations, and ellipses omitted).

In *Alabama*, this Court explained that the need for district-specific determinations "is not a technical, linguistic point." 135 S. Ct. at 1265. The district court in that case had found that race did not predominate because it did not control in every majority-minority district. See *id.* at 1265-1266. This Court emphasized that "[a] showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that

race-based criteria predominantly affected the drawing of *other* Alabama districts." *Id.* at 1266. It thus determined that the district court's "undifferentiated statewide analysis [wa]s insufficient" and remanded for a more individualized assessment. *Ibid.*

The opposite principle is equally true: A showing that race predominated in some districts does not mean that race predominated in other districts. To be sure, the line-drawing decisions made as to one district will necessarily affect neighboring districts. See *Bethune-Hill*, 137 S. Ct. at 800. But the same decision may affect the predominance calculation differently. Cf. *United States* v. *Hays*, 515 U.S. 737, 745-746 (1995) (concluding that voters lacked standing to challenge racial gerrymander of neighboring district). In one district, a border shift might contribute to a pattern of decisions that prioritize a racial target over traditional criteria. In an adjoining district, meanwhile, the same border shift might improve the district's compactness, and the same racial target might not impose any significant constraint. A court that finds racial predominance as to the former district thus should not extend that finding to the latter district based only on the subset of line-drawing decisions that connect the two districts.

b. Here, the district court repeatedly suggested that a conclusion that race predominated in some of the challenged districts necessarily doomed the other districts in the same "regional grouping[]." J.S. App. 38; see, *e.g.*, *id.* at 39, 57, 64-65. The court conceived of each challenged district as either a "donor" or a recipient district. See, *e.g.*, *id.* at 28, 39, 46, 54, 83. And it made clear that it viewed "the fates of the 11 remaining challenged districts in this case [as] *inextricably intertwined*." *Id.* at 83 (emphasis added).

The district court's discussion of District 92 presents the starkest example of its misguided all-or-nothing reasoning. As discussed, District 92 complies with a number of traditional districting criteria, and it improved across several neutral metrics from the benchmark plan to the 2011 plan. See p. 29, *supra*. The court nonetheless found that race predominated because District 92 "received population exclusively from" challenged District 95, and "the population moved into District 92 was controlled by * * * race-based decisions in District 95." J.S. App. 63, 64. But even if race predominated in the drawing of District 95 as a whole, the transfer of three VTDs for race-conscious reasons from District 95 to District 92 does not automatically mean that race predominated in the drawing of District 92 as a whole—least of all where that transfer made District 92 more compact.

Other emphasis on spillover effects appears throughout the district court's opinion. See, *e.g.*, J.S. App. 45 (finding that race predominated in District 70 largely because "the significant race-based maneuvers required to increase the BVAP of District 71 had a substantial impact on the boundaries of District 70"); *id.* at 49 (finding that race predominated in District 69 largely because it "received the advantage of the ability of District 70 to 'donate' BVAP"); *id.* at 52 (explaining that "the role of race in the construction of District 63 was inextricably intertwined with the race-based population shifts of District 75"); *id.* at 76-77 (explaining that "the redistricting decisions made in [District 90] were integrally connected with the race-based decisions made elsewhere"). In some circumstances, the court may have permissibly considered the effects of regional shifts on multiple districts. But the court's general all-

or-nothing approach to racial predominance in each region meant that it failed to perform an independent evaluation of every individual district.

C. The Court Should Remand For Application Of The Correct Predominance Standard

Together, these three aspects of the district court's analysis demonstrate that the court failed to apply the correct legal standard for assessing racial predominance in each district as a whole. The court's bottom-line conclusion that race predominated in all 11 challenged districts—no matter how compact the district became, or how few of its boundaries involved possible race-based explanations, or how little its BVAP changed—confirms that it did not engage in a sufficiently rigorous predominance analysis on a district-by-district basis.

When a district court applies an incorrect legal standard, the Court's usual practice is to vacate and remand for application of the correct legal standard. See *Bethune-Hill*, 137 S. Ct. at 800; *Alabama*, 135 S. Ct. at 1272; *Shaw I*, 509 U.S. at 658. Because the district court may reach different conclusions upon application of the correct standard, this Court should again follow its regular practice by remanding for the fact-intensive application of the correct predominance standard.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should vacate the district court's judgment and remand the case for further consideration.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
ERIC S. DREIBAND
Assistant Attorney General
JEFFREY B. WALL
Principal Deputy Solicitor General
JOHN M. GORE
Principal Deputy Assistant Attorney General
MORGAN L. RATNER
Assistant to the Solicitor General
TOVAH R. CALDERON
ANNA M. BALDWIN
Attorneys

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